

AZIZAN IBRAHIM v. PP
HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CRIMINAL APPEAL NO: 41S(A)-2-09-2013]
16 APRIL 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused convicted for charge of assaulting or using criminal force against victim with intention of outraging her modesty – Accused sentenced to 12 months’ imprisonment – Whether conviction and sentence safe – Penal Code, s. 354*

CRIMINAL LAW: *Penal Code – Section 354 – Accused charged for assaulting or using criminal force against victim with intention of outraging her modesty – Whether allegation of kiss mark on victim’s breast supported by medical report – Whether location where incident supposedly took place had corn plantation – Whether victim’s story believable*

EVIDENCE: *Witness – Character – Bad character – Accused convicted for charge of assaulting or using criminal force against victim with intention of outraging modesty – Penal Code, s. 354 – Accused brought up victim’s past sexual activity – Whether victim a truthful witness – Whether victim’s past personal sexual activity should be used to measure her degree of truthfulness*

The appellant, a head of security at UiTM Perlis, had allegedly offered to bring a student (‘the victim’) to visit a house for rent. According to the victim, on the way back after the visit, the appellant placed his hands on the victim’s right breast while driving and later pulled over at the side of a dark and quiet road near a corn plantation. The appellant then began to kiss the victim’s right breast, leaving a mark. The victim tried to resist but the appellant threatened to expose to the victim’s mother that she was caught red-handed for indecent behaviour with another university mate. After the appellant was satisfied, he dropped the victim off in front of a supermarket. It was only 13 days later that the victim lodged a police report. The appellant was charged at the Magistrates’ Court for assaulting or using criminal force against the victim with the intention of outraging her modesty, an offence under s. 354 of the Penal Code. The appellant was convicted for the said offence and sentenced to 12 months’ imprisonment. Dissatisfied, the appellant filed the present appeal and submitted that (i) the allegation of a kiss mark on the victim’s breast was not supported by any medical report; (ii) the location where the incident supposedly took place had no corn plantation; (iii) the victim’s story could not be believed because it was impossible that the appellant could unbutton the victim’s shirt while driving at 90km per hour; and (iv) the victim could not be a truthful witness due to her bad character.

A Held (dismissing appeal):

- (1) For s. 354 of the Penal Code to apply, the essential ingredients that must be proved are: (i) there must have been assault or use of criminal force; and (ii) such assault or criminal force must have been made with (a) the intention to outrage the person's modesty; or (b) with the knowledge that the person's modesty was likely to be outraged. Based on the prosecution's narrative, there were overwhelming suggestions and evidence that the appellant had used criminal force against the victim. Placing his hand(s) forcefully on the victim's breast without her consent was sufficient to establish criminal force; and intentionally doing such an action would be sufficient to establish intention to outrage the modesty of the victim. (paras 33 & 34)
- (2) A kiss mark is basically a bruise caused by sucking; a burst of small blood vessels under the skin. How long the mark stays will depend on how severe the bruise is. The incident happened on 19 February 2011 and the medical examination was undertaken on 4 March 2011, a day after the lodgement of the police report. It was very unlikely that there could be a kiss mark seen on the victim's body after a lapse of 14 days. The victim had explained the reason for her delay in lodging a police report. She was confused and did not know how to react to the situation that she got herself into. (paras 42-44)
- (3) There was a corn plantation at the vicinity where the alleged incident had taken place. The witnesses went to the location and had given fairly detailed descriptions of the surrounding areas. There was no reason for them to come to court to fabricate a fact. Their evidence was firm and not shaken at all. (paras 60-62)
- (4) The victim repeated twice in her testimony that the appellant unbuttoned her shirt with one hand while the other hand was on the driving wheel. What the victim alleged was not something so inherently incredible or inconceivable or was a fact that defied logic. (paras 64 & 65)
- (5) A victim's personal sexual activities in the past should not be used to measure her degree of truthfulness in giving evidence in court. The giving of evidence in court is the making of statements under oath. Furthermore, the victim's evidence in this case was corroborated by her conduct and the surrounding circumstances and was consistent with ordinary probabilities. In the circumstances, there was no evidence that raised a doubt in the prosecution's case. (paras 70 & 72)

Legislation referred to:

- I Penal Code, s. 354
Penal Code 1860 [Ind], s. 354

Other source(s) referred to:

Ratanlal Dhirajlal's Law of Crime, 24th edn, vol 2, p 1699

For the appellant - Jamil Mohamed Shafie; M/s Jamil Mohamed Shafie & Assocs

For the respondent - Naizatul Zima; DPP

[Editor's note: Appeal from Magistrate's Court, Jitra; Arrest Case No: 82-01-11]

Reported by Najib Tamby

JUDGMENT**Choo Kah Sing JC:****Introduction**

[1] The appellant was charged for an offence under s. 354 of the Penal Code. The charge reads as follows:

Bahawa kamu pada 19/02/2011, jam lebih kurang 08.00 malam di tepi Jalan Bukit Tangga, Bukit Kayu Hitam di dalam Daerah Kubang Pasu dalam Negeri Kedah Darul Aman dengan sengaja menyerang dan menggunakan kekerasan jenayah dengan cara meraba buah dada mangsa nama XXX, No. K/P XXX dengan niat untuk mencabul kehormatannya. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seskyen 354 Kanun Keseksaan.

[2] On 8 September 2013, the appellant was convicted by the Magistrate's Court in Jitra, Kedah, at the end of the defence case. He was sentenced to 12 months imprisonment by the Magistrate. He was to serve the imprisonment term from the date of conviction. The appellant was not satisfied with the Magistrate's decision and obtained a stay of execution of the sentence. He appealed to the High Court against his conviction.

[3] On 16 February 2016, I dismissed the appellant's appeal and affirmed the Magistrate's decision dated 8 September 2013. The appellant was not satisfied with my decision and filed an appeal to the Court of Appeal. This judgment serves as the reasons for my decision. The reasons are set out as below.

The Prosecution's Narrative

[4] The prosecution called six witnesses in its case. SP1, the victim, gave evidence. At the time the alleged offence was committed, she was a university student in UiTM, Perlis. The appellant was the head of security in the university.

[5] The victim recalled that the incident happened in the evening on 19 February 2011; and the incident took place in the appellant's car bearing registration number KCC 2651.

[6] The appellant offered to bring the victim to visit a house for rent in Arau. After the visit, they stopped for dinner in Alor Setar. On the way back

A to the university, the appellant unbuttoned the victim's shirt. He then placed one of his hands on the victim's breast while driving. The appellant managed to pull off the victim's bra.

[7] The appellant then pulled the car over the side of the road. The road was dark and quiet. The road, according to the victim's police report (P1),
B was near a corn plantation in Bukit Tangga.

[8] The appellant alighted from the vehicle, went to open the car boot and the back-seat door. He came to the front and opened the front passenger's door where the victim was seated. The appellant lowered the victim's seat
C to the back and unbuttoned the victim's shirt. He began to kiss the victim's right breast. A kiss mark was left on the victim's breast.

[9] During the sexual encounter, the victim tried to avoid the appellant by pushing the appellant's head away from her body, but to no avail. The appellant took the victim's hand and placed it on his private part. The victim
D described:

OKT meletakkan tangan saya ke kemaluannya sehingga kemaluannya berair barulah dia lepaskan tangan saya.

[10] The victim told the appellant several times that she did not want to do it, but he turned a deaf ear to the victim's plea. The appellant threatened
E to expose to the victim's mother that the victim was caught red-handed for indecent behaviour, ie, having an intimate relationship with another university mate, in the university, if she did not allow him to do what he wanted. The victim was worried, because the victim's mother had a weak heart. She did not want her mother to feel sad if she found out about the
F matter.

[11] After the appellant had satisfied himself, he dropped her off in front of Seri Wang supermarket. The victim narrated that the appellant told her that he would call her to go out with him again.

[12] On 3 March 2011, 13 days later viz from 19 February 2011 to 3 March 2011, the victim lodged a police report (P1) against the appellant concerning
G the incident on 19 February 2011. Before she went to lodge the police report, the victim had related the incident to one resident staff in the university, Encik Kamal Arif (SP4), her boyfriend's sister Farhana (SP6) and her
H boyfriend and asked them for advice.

[13] The victim explained that she did not lodge the police report immediately after the incident involving the appellant, because she was frightened. After speaking to SP4, she decided to lodge the police report.

[14] SP4 was a pegawai pembantu IT and pegawai pembangunan pelajar/
I warden asrama in the university. He testified that he was the officer who caught the victim having an intimate relationship with a university mate in the university. SP4 told the court that the victim did at that time tell him that

the victim's mother was unwell, and had requested him not to address any letter to her mother concerning the incident in the university. She suggested that any letter issued by the university should be sent to her sister.

A

[15] On 20 February 2011, the victim wanted to meet SP4, but he was busy with his work. On 24 February 2011, the victim called SP4 on his mobile phone and narrated the incident involving the appellant to him while sobbing. He confirmed that the victim did tell him about the incident involving the appellant on 19 February 2011.

B

[16] SP4 narrated to the court what the victim had told him. The following day, SP4 accompanied the victim to see the university's counsellor Puan Hajah Rosni. SP4 was not present when the victim talked to the counsellor.

C

[17] On 28 February 2011, SP4 met with the Puan Hajah Rosni and one Encik Zulkifli Suhaimi to discuss the matter. They decided to investigate the allegation further. SP4 was not aware what happened after that. Several days later, the victim told him that she could not take it anymore and she wanted to lodge a police report against the appellant.

D

[18] SP4 told the court that he, the victim and SP6 went to the place of the incident to take some pictures to show to the police as requested by the police. They went during the afternoon. SP4 recalled that one side of the road was full of bushes and the other side had a corn plantation.

E

[19] The photographs (P2 A-C) that were tendered in court were taken by the police photographer SP2 during the night, not SP4.

[20] SP4 also told the court that the victim was threatened by the appellant. According to the victim, the appellant threatened to send a letter to the victim's mother to inform her that the victim had been suspended from university for a semester.

F

[21] SP6 told the court that she and the victim met the appellant twice before the incident on 19 February 2011. She could not remember the date of the first meeting. The second occasion they met was at Masjid Awi, in front of a kedai makan, on 18 February 2011. The reason they met was about a letter the appellant intended to send to the victim's mother. They met the appellant to discuss whether the letter could be given to the victim, instead of the appellant sending it to the victim's mother.

G

[22] SP6 also told the court that the victim subsequently narrated to her about the incident on 19 February 2011, including where and when it happened.

H

[23] The investigating officer, SP5, gave a detailed account of her investigation. She told the court that when she visited the place of incident she could not see much of the surrounding because it was at night. But, she could confirm that there was a corn plantation by Bukit Felda-Mardi nearby.

I

- A [24] The Magistrate was satisfied that the prosecution had proved a *prima facie* case against the appellant after the close of the prosecution's case. The appellant was ordered to enter his defence.

The Defence

- B [25] In the defence case, six witnesses were called.

- [26] The appellant, SD1, admitted that he was with the victim in the evening of 19 February 2011. They went out together because the victim asked his help to send her to Arau to look for a house to rent. The appellant agreed to help the victim. They went for dinner after visiting the house in Arau. After dinner, he dropped the victim off in front of a supermarket. He then went home.
- C

- [27] The appellant told the court that he was driving 90km per hour on the road heading to UUM. He took the road from Arau to Kuala Perlis to go back, and he did not use the route as alleged in the victim's story. He denied taking advantage of the victim. He also denied using or having any letter with him to threaten the victim.
- D

- [28] SD2, the deputy rector for students' affairs (Timbalan Rektor Hal Ehwal Pelajar) at UiTM for the year 2011, gave evidence for the appellant. He confirmed that the victim was involved in an incident involving immoral behaviour in the university. He also confirmed that a disciplinary proceeding was carried out by the university pertaining to victim's immoral behaviour. He further confirmed that the victim was suspended for a semester in the university.
- E

- [29] SD5, the appellant's wife, gave evidence that on the day of the alleged incident the appellant was at home with her and the children; they were watching television. She said the appellant came back home around the time before maghrib (presumably referring to around 7.30pm).
- F

- [30] SD5 told the court in cross-examination that the appellant came home after work and went out around 4pm that day, ie, 19 February 2011. The appellant did tell her that he was going out with a student and that he was helping the student look for a house to rent.
- G

- [31] The crux of the appellant's evidence was that he did not commit the offence as alleged by the victim.

- H **The Findings Of This Court**

- [32] Section 354 reads as follows:

- I Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

[33] For this section to apply, the essential ingredients must be proved. First, there must have been assault or use of criminal force; secondly, such assault or criminal force must have been made (i) with intention to outrage the person's modesty; or (ii) with knowledge that the person's modesty was likely to be outraged.

A

[34] Based on the prosecution's narrative, there were overwhelming suggestions and evidence that the appellant had used criminal force against the victim. Placing his hand(s) forcefully on the victim's breast without her consent was sufficient to establish criminal force; and intentionally doing such action would be sufficient to establish intention to outrage the modesty of the victim.

B

C

[35] The word "modesty" is not defined in the Penal Code, and it is difficult to give a comprehensive meaning to it, because what tantamount to modest to one may not be to another. However, I believe, placing one's hand on a woman's breast is surely an act of outraging the modesty of a woman in any culture and/or society, if it was not done with her consent, even if it was committed in private.

D

[36] On the burden of proof, according to *Ratanlal Dhirajlal's Law of Crime*, 24th edn, vol 2, p. 1699, it has this to say:

The charge under this section is one which it is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence besides that of the woman herself, or is corroborated by her conduct and the surrounding circumstances and is consistent with ordinary probabilities. Where solitary evidence of the prosecutrix did not appear to be cogent or reliable, the accused was entitled to acquittal. There is no warrant for laying down the wide proposition that in a case under this section or, for the matter of that, in any case relating to a sexual offence excepting rape, independent corroboration of the prosecutrix's evidence can be insisted upon. If the intention of the accused to outrage the modesty of the victim is not proved and the victim is a consenting party to the affair, the accused cannot be convicted under the section ...

E

F

G

[37] The Indian Penal Code s. 354 is worded slightly different from our Penal Code, *vis-à-vis*, the victim has to be a woman in the Indian Penal Code; whereas, ours stated as "any person", but, the essential ingredients and basic legal propositions are of persuasive values, minus the ingredient that the assault or criminal force must be directed to a woman. Guided by the above burden of proof, I now turn to examine whether the allegation was supported by independent evidence besides that of the victim herself, or was corroborated by her conduct and the surrounding circumstances and was consistent with ordinary probabilities.

H

[38] The appellant's counsel raised several issues and submitted that they were not proved or supported by evidence. Hence, the conviction was not safe, and the appellant was entitled to an acquittal, he argued.

I

A *Independent Evidence*

[39] The incident happened in a dark and quiet road, no independent witness saw what actually transpired. Mere absence of an independent witness testimony could not disprove the fact that it did not happen.

B *Kiss Mark*

[40] In regard to the kiss mark, the appellant's counsel submitted that the kiss mark was not supported by a medical report (P10). In the absence of clear evidence of a kiss mark in the medical report, the defence was entitled to assert that the victim could not be telling the truth. Nothing to prove that there was a kiss mark on the victim's breast.

[41] I could not agree with the above submission that the absence of a medical report to prove there was a kiss mark would entitle the appellant a benefit of the doubt to be raised in the prosecution's case.

D [42] The incident happened on 19 February 2011, and a police report was lodged 13 days later, the medical examination was undertaken on 4 March 2011, a day after the lodgement of the police report. I am of the considered view that it is very unlikely there could be a kiss mark seen on the victim's body after a lapse of 14 days. A kiss mark is basically a bruise caused by sucking – a burst of small blood vessels under the skin.

E [43] How long the mark will stay depends on how severe the bruise is. If the victim had lodged a police report a day or two after the incident, the kiss mark could likely have been visible upon a medical examination. In such scenario, if the medical officer conducting the medical examination did not see any mark, I would be inclined to accept the defence counsel's submission, but, not in this given set of facts, ie, where the medical examination was conducted after 14 days.

F [44] The victim had explained the reason for her delay in lodging a police report. She was confused and did not know how to react to the situation that she got herself into.

G *Corn Plantation*

H [45] The appellant's counsel also submitted that the location where it was alleged the incident had taken place had no corn plantation. The Magistrate failed to address her mind to the issue raised by the appellant's case. As such, there was misdirection by the Magistrate relating to the evidence in her findings.

I [46] The appellant tendered photographs (D12 A-D) to support his contention that there was no corn plantation found anywhere nearby the vicinity.

[47] I have examined the entire testimony of the appellant from the Rekod Rayuan (p. 98 - Jilid 1 to p. 115 - Jilid 2). The photographs (D12 A-D) were taken by the appellant and they were tendered in court (see p. 105 of Jilid II) to suggest that the location in pictures D12 A-D was the place where the alleged incident took place. A

[48] There is no record in the notes of evidence in the appellant's testimony which suggested that there was no corn plantation at the vicinity. The appellant did not say there was no corn plantation there. B

[49] There was no question posed to the appellant in regard to the surrounding conditions of the location in the pictures taken by the appellant. The appellant did not give any evidence that the place in the pictures did not show any corn plantation (see p. 105 Rekod Rayuan Jilid I). C

[50] In the victim's cross-examination, counsel for the appellant shown P2 A-C to the victim, and the victim confirmed no corn plant was seen from those pictures (P2 A-C) (see p. 38 of Rekod Rayuan Jilid I, question 27). In re-examination, the victim answered: D

Kawasan tempat kereta diberhentikan adalah kawasan gelap berbukit-bukit, tiada divider tengah dan selepas simpang ada kawasan lapang sebelah kanan jalan dan selepas itu ada hutan dan sebelah kiri ada hutan. Ladang jagung berada di kanan jalan. Rujuk ID2, ia berada di kanan. E

[p. 42 Rekod Rayuan Jilid I]

[51] SP4 testified that he was very sure that there was a corn plantation in the vicinity of the place of the incident (see p. 52 of Rekod Rayuan Jilid I). Again in a later part of his testimony, he recalled what he saw at the place, and he said as follows: F

Yang saya ingat sebelah kiri adalah kawasan semak dan seberang jalan sebelah kanan adalah tanaman jagung.

[p.54 Rekod Rayuan Jilid 1]

[52] SP4 went to the place of incident around afternoon; therefore, he should have been able to observe the surrounding vicinity clearly. G

[53] SP4 recognised the place through the photograph P2 B (p. 150 Rekod Rayuan Jilid II), and he stated:

Sebelah kiri semak dan sebelah kanan penanaman jagung. H

[p. 55 Rekod Rayuan Jilid I]

[54] In cross-examination, SP4 was challenged by the appellant's counsel to visit the place (showing him the pictures P2 (A-C)) and it was suggested that there was no corn plantation there. SP4's testimony was recorded as follows: I

S : Cuba lihat gambar C - ada tak gambar pokok jagung?

J : Ya.

- A S : Setuju tak gambar yang saya tunjuk tadi, tak ada gambar pokok jagung?
J : Tidak setuju.
S : Jadi kamu yakin yang kalau kita pi hari ini, boleh tengok lagi pokok jagung tu?
- B J : Boleh.

[p. 58 Rekod Rayuan Jilid I]

[55] Later part of the cross-examination, same questions raised to SP4, again, SP4 firmly gave his answers as follows:

- C S : Kamu dan xxx [victim] kata ada pokok jagung di tempat kejadian?
J : Ya.
S : Saya kata ianya tak benar sebab itu kamu tak bawa gambar itu pada siang hari?
- D J : Tidak setuju.
S : Jadi kamu pasti kalau pergi ke tempat kejadian pada siang hari ada pokok jagung?
J : Pasti.

[p. 59 Rekod Rayuan Jilid I]

[56] The investigating officer, SP5, testified that she was aware that there was a corn plantation within the vicinity of the place of incident. She stated as follows:

- F Saya tahu, tanaman jagung memang ada di jalan tersebut di Bukit Felda - Mardi tidak jauh dari tempat kejadian.

[p. 72 Rekod Rayuan Jilid I]

[57] SP6 also gave evidence that there was corn plantation at the place of incident. She stated as follows:

- G S : Bila pergi?
J : Tengah hari.
S : Di mana kawasan xxx dicabul?
J : Di kawasan Bukit Tangga - ada tanaman jagung dan sebelahnya hutan.
- H

[pp. 86-87 Rekod Rayuan Jilid I]

[58] In cross-examination, SP6 stated as follows:

- I S : Memandangkan kamu kata gambar ini sama, lihat gambar yang cerah ini tak ada pun tanaman jagung?
J : Ada tanaman jagung di sebelah kiri di gambar (P2B).

S : Cuba kamu lihat betul-betul, ada tanaman getah dan sungai di gambar tu? Tak ada tanaman jagung. A

J : Saya pasti ada pokok jagung di situ.

S : Kamu pergi dengan Kamal pukul berapa?

J : Tengah hari, dalam pukul 1 tengah hari. B

[p. 89 Rekod Rayuan Jilid I]

[59] In re-examination, SP6 stated as follows:

S : Pohon rujuk gambar-gambar semula kepada SP6 (IDD11A-O [*sic*] - 4 keping gambar tempat kejadian versi OKT). Tadi peguam kata tiada tanaman jagung dan kamu tak setuju. Boleh jelaskan. C

J : Yang nampak sign board di sebelah kiri memang ada tanaman jagung (P2B).

[p. 92 Rekod Rayuan Jilid I]

[60] After having combed through the evidence in the Rekod Rayuan, the prosecution's evidence and the defence's case, I am satisfied that there was a corn plantation at the vicinity where the alleged incident had taken place. SP4 and SP6 went to the location and had given fairly detailed descriptions of the surrounding areas. There was no reason for them to come to court to fabricate a fact. D E

[61] When SP4 was challenged to visit the place to determine whether there really any corn plants, he did not hesitate. Likewise, SP6 firmly answered there were corn plants at the place of incident. Their evidence was firm and not shaken at all. F

[62] I could not see the appellant had raised a doubt in the prosecution's case that there was no corn plantation at the vicinity at the place where the alleged incident had taken place.

The Victim's Story Could Not be Believable

[63] The appellant's counsel submitted that it was impossible that the victim's story was true in that the appellant could unbutton the victim's shirt while driving. The appellant was alleged to be driving at 90km per hour at the time. G

[64] The victim repeated twice in her testimony that the appellant unbuttoned her shirt with one hand while his other hand was on the driving wheel. The victim stated as follows: H

Lepas itu Azizan bawa saya ke kawasan UUM Sintok. Dalam perjalanan dia ada buka butang baju saya dan pegang buah dada saya.

[p. 30 Rekod Rayuan Jilid I] I

- A OKT mula buka butang baju saya dalam perjalanan ke roundabout itu. OKT memegang buah dada saya dalam masa 10-15 minit. Saya ada pakai bra, bra saya telah ditarik ke bawah oleh OKT.

[p. 32 Rekod Rayuan Jilid I]

- B [65] I am of the view that what the victim had alleged was not something so inherently incredible or inconceivable or was a fact that defied all logic.

SD5's Evidence – Alibi

[66] The evidence of SD5 has to be taken with caution. SD5 is the wife of the appellant. The Magistrate stated this in her judgment as follows:

- C 21. Mahkamah juga mendapati isu alibi yang cuba dibangkitkan oleh pembelaan melalui isteri OKT (SD5) haruslah dinilai dengan berhati-hati dan syak wasangka. OKT dalam kes ini langsung tidak menolak fakta bahawa pada tarikh kejadian, dia ada keluar bersama SP1. Malah di pihak pembelaan juga telah mencadangkan pula gambar lain tempat kejadian yang sebenar iaitu D11 (walaupun pada hemat Mahkamah ianya bukanlah satu elemen untuk membuktikan kes di bawah seksyen 354 Kanun Keseksaan). Dan setelah mendengar keterangan SD5 serta melihat 'demeanour' saksi pembelaan ini, mahkamah menolak keterangan saksi ini memandangkan mahkamah mendapati keterangan SD5 hanyalah bersifat penafian kosong dan bertujuan untuk melepaskan suami beliau semata-mata.
- D
- E

[67] The Magistrate had discharged her duty carefully; she had exercised her discretion carefully before rejecting SD5's evidence. Hence, there was no reason for this court to disturb her finding of fact.

F *Other Issues Raised*

- [68] The appellant's counsel had raised many other issues, including, *inter alia*, there was no evidence to prove the victim's mother was not well, the police report (P1) failed to include details of the accounts (such as, the appellant had an ejaculation, or the police requested for photographs from SP4 or the victim), and all the SMS alleged to have transpired were not adduced in the trial. I have sieved through these issues, and found that they were not essential facts that needed to be corroborated; failure to corroborate such facts would not render a conviction unsafe.
- G

- H [69] One part of the appellant's defence relied on the alleged "bad character" of the victim. The appellant argued that the victim could not be a truthful witness. I reserve my comment on the victim's character. What is important is what a victim did in the past or in her private life should not prejudice the mind of a judge, particularly a victim in a sexual offence case.

- I [70] A victim's personal sexual activities in the past should not be used to measure her degree of truthfulness in giving evidence in court. The giving of evidence in court is the making of statements under oath. For a woman to

expose herself in public by giving evidence to say that she was sexually abused by an accused is not an easy task. It could bring shame and embarrassment to her and even to her family, especially to the parents of the victim. Hence, a court should be careful not to be prejudiced by the victim's past sexual activities.

[71] A judge should observe carefully the demeanour of the victim while giving evidence, likewise, the demeanour of other witnesses. In this instant case, I think the trial judge had discharged that duty diligently. The Magistrate in her judgment stated as follows:

18. Pada hemat Mahkamah juga, tiada sebab bagi SP1 untuk mereka-reka cerita yang sangat mengaibkan ini dan bercakap bohong di mahkamah lebih-lebih lagi ianya juga akan menjatuhkan maruah dirinya sendiri. Keterangan ini juga disokong oleh keterangan SP4 iaitu Resident Staff atau Warden asrama dan juga keterangan SP6, kakak teman lelaki SP1 sendiri dan setelah Mahkamah melihat (dengan izin) 'demeanour' cara saksi-saksi awam ini menjawab soalan ketika pemeriksaan utama, pemeriksaan balas dan juga pemeriksaan semula dengan begitu bersungguh-sungguh dan konsisten, Mahkamah menerima keterangan saksi-saksi awam ini adalah benar dan tiada sebab juga bagi ketiga-tiga saksi ini untuk bercakap bohong dan menganiaya OKT sepertimana dakwaan pembelaan.

19. Mahkamah juga telah meneliti Nota Keterangan Pengadu (SP1) dan juga menyaksikan keterangan SP1 melalui rakaman CRT Mahkamah (memandangkan keterangan SP1 didengar oleh Tuan Majistret terdahulu) di mana SP1 telah menjawab dengan bersungguh-sungguh dan konsisten ketika pemeriksaan utama, pemeriksaan balas dan pemeriksaan semula dan oleh itu, pada hemat mahkamah saksi ini telah berkata benar dan saya menerima keterangan SP1 juga adalah benar tentang kejadian tersebut. Oleh yang demikian, ketiadaan sokongan Laporan Perubatan bagi kes-kes di bawah seksyen 354 Kanun Keseksaan bukanlah suatu isu yang fatal seperti di dalam kes rogol di bawah seksyen 376 Kanun Keseksaan. Apa yang penting adanya koraborasi antara saksi-saksi SP1, SP4 dan SP6 ini tidak terputus chain of evidence dan ianya adalah konsisten dan menyokong antara satu sama lain.

[72] After having considered all the evidence in the prosecution's case and the appellant's case, I am of the considered view that the victim's evidence was corroborated by her conduct and the surrounding circumstances and was consistent with ordinary probabilities. I could not find any evidence that could raise a doubt in the prosecution's case.

Conclusion

[73] Based on the above reasons, I dismissed the appellant's appeal and affirmed the Magistrate's Court's decision dated 8 September 2013.